IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 556 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUSTUFA SULEMAN KUSKIWALA - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR.JOSHI, FOR MR.P.M.THAKKAR, LD. SENIOR ADVOCATE for Appellant,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent-State,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 02/03/2007

ORAL JUDGMENT

Present Appeal is arising out of the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Sabarkantha at

Himmatnagar, on 23rd March, 1995, in Summary (Criminal Case) No.11 of 1987 whereby the present appellant-accused was convicted for the offence punishable under Sections 3 and 7 of the Essential Commodities Act, 1955 and was sentenced to undergo three months simple imprisonment and was ordered to pay a fine of Rs.250/-, in default thereof, to undergo simple imprisonment for one month for each offence. The learned Judge has ordered that all the sentenced should run concurrently. The date of commission of offence is 9th December, 1986.

2. It is the case of the prosecution that while inspecting the shop of the appellant-accused, the Inspecting Officer found six irregularities and illegalities. However, on plain reading of those irregularities mentioned in the complaint, it appears that out of six irregularities, four irregularities were grave in nature in comparison with other irregularities mentioned at Sr. Nos.1 and 2. As per say of the prosecution, it was the main allegation that while carrying out the inspection, the Officer found that two tins of edible groundnut oil were

excess than the actual stock mentioned in the register maintained and in the same way during physical verification as to the sell and purchase of edible oil, about 24 Kg. oil was found excess than the actual reflected in the accounts by the Inspecting Officer. It was also observed by the Inspecting Officer that four tins of mustard oil of 15 Kg. were not there and found less than the stock mentioned. Most of the grave allegations in the complaint is that the stock of rice was found less of 6532 Kg. The accused was holding authority to sell rice as a whole seller and also as a retailer. In the register maintained as whole seller dealer, the opening stock was mentioned as 2132 Kg., and in the register maintained as retailer, it was 2829 Kg. But, during the inspection carried out on 9th December, 1987, the difference between purchase and sale was shown that the actual stock of rice with the trader should be of 26141 Kg., cumulatively but on physical verification it was found 19109 Kgs., and thus, it was less by 6532 Kgs. According to prosecution these irregularities were in clear violation of Condition No.7, 4 (1), 8 of the Licence,

so also under Sections 26, 23 and 18 (7) (4) of the Gujarat Essential Article (Licence, Control and Stock Declaration), Order, 1981.

3. I have heard learned Counsel, Mr.Joshi, appearing for the appellant and learned Addl. Public Prosecutor, Ms.Pandit, for respondent-State. They have taken me through the records and proceeding available before the Court.

4. Mr.Joshi has drawn attention of this Court to the infirmity in the evidence led by the prosecution so far as missing stock of rice of 6532 Kg. mentioned in the complaint is concerned. The prosecution was supposed to lead the best evidence to prove allegation and most relevant documents were neither seized nor produced during the trial. Even, the learned trial Judge while assigning reasons has discussed this aspect in paragraph No.27 of the judgment but the plain reading of paragraphs No.21 and 22 is sufficient to draw the finding that the same is based on surmises and not on the evidence. The oral version of the witnesses examined to prove

this allegation ought not to have been accepted as gospel truth when it was required to be proved by the cogent documentary evidence. It is not the say of the prosecution witnesses that the relevant bill-book was not available showing sale and purchase of the stock. Of course, the stock register of rice is produced but the rice was not essential commodity. One of the Inspecting Officer had accepted that because of some error, bill-book relating to business of rice could not be collected or seized and one another bill-book was erroneously seized. The bill-book sealed which was shown at Sr.No.4 was the bill-book of jaggery (raw sugar) starting from 3rd November, 1986. The description of this bill-book is also given by the learned Judge. The genuineness of the entry in the stock register can be cross-checked with the help of bill-book otherwise, it can be said to be an error in maintenance of stock register. There was no charge of overpricing or black-marketing. It is not the say of any of the prosecution witnesses that the area or the State of Gujarat was facing scarcity or deficit qua the rice. So, the learned trial Judge ought to have insisted for best evidence. The Panch Witnesses have

not supported the prosecution case. Panch Witness-Abdul Razak Gulamrasul Khalak, who has been examined at Exh.69 has stated in cross-examination that he cannot say whether there was any deficit stock of rice. So, atleast this Court according to Mr.Joshi, should observe that the allegation made in the complaint qua the deficit stock of rice is erroneously held to be proved.

5. I have also heard learned A.P.P., Ms.Pandit on this point. According to her, the Officers may have committed a bona-fide mistake in seizing the bill-book and error cannot be said to have been committed especially when more reliable evidence like stock register of rice was available with the Court. She has further submitted that when the Panch Witness has not supported the case of the prosecution and when there is no charge of either black-marketing or overpricing of rice against the accused, the learned Judge ought not to have held the accused guilty for at least this charge in absence of best evidence, which otherwise could have been produced before the Court.

6. So far as other allegation qua deficit in oil tins are concerned, the deficit of 24 Kg. of groundnut oil was in the nature of 1 Kg. paper pack. Mr.Joshi has submitted that in those days the accused was selling 'Dhara Brand Oil' of 1 Kg. pack and for these irregularities he has attempted to explain and that explanation ought to have been accepted by the Collector and thereafter by the Court. But, ultimately after going through the oral as well as documentary evidence led by the prosecution and when the accused himself has accepted that neither the bills were issued on account of sale or transfer of the stock nor the entry of new purchase was made into the stock register, the finding of the learned trial Judge cannot be said to be erroneous or otherwise illegal.

7. After some deliberation and on instructions of the appellant-accused, Mr.Joshi has fairly accepted that in respect of the conviction recorded by the learned trial Judge qua irregularities in reference to groundnut oil and the mustard oil, he

may not press the appeal on merits, as the finding recorded by the learned trial Judge is based on sound reasons and other relevant circumstances including the admission made by the appellant-accused before the Inspecting Officer. There was no reason for the Inspecting Officer to falsely implicate the accused on such small stock. If the intention of the Inspecting Officer was ill then they could have implicated the accused with more graver charge in the report and thereafter in the complaint. When the accused was authorized to deal in the business as whole seller, as well as retailer, he ought to have acted carefully in maintaining the relevant registers and the stock register meticulously.

8. Ms.Pandit, learned A.P.P., has nothing more to add when the appellant-accused has not pressed the appeal qua conviction so far as charges qua the edible oil, groundnut oil and mustard oil are concerned. Rest of the allegations are of trivial in nature and they have been properly dealt with by the learned trial Judge. The question of presence of *mens rea* would also play an important role so far as the

other two irregularities are concerned but, it is not necessary to discuss this aspect as the accused has decided not to challenge the validity of the ultimate finding of the conviction recorded by the learned trial Judge.

9. The say of Mr.Joshi is that even after confirming the order of conviction this Court should not send the accused in the jail as ordered by the learned trial Court and the order of sentence may be modified and it should be reduced to minimum. But, before reducing the substantive punishment imposed by the trial Court, this Court should think whether the appellant-accused can be given the benefit of Probation of Offenders Act under the provisions of Section 360 and 361 of the Code of Criminal Procedure, because though minimum punishment is prescribed for the offence held proved against the accused, there is no bar in granting benefit of Section 360 of the Code of Criminal Procedure to the appellant-accused.

10. The appellant-accused has filed a detailed

affidavit in support of this submission and the contents of the affidavit gets further direct support from the documents attached with the affidavit.

11. While considering the submission of Mr.Joshi, the Court would like to concentrate firstly on the part of minimum punishment prescribed in the Act for the offence punishable under Sections 3 and 7 of the Essential Commodities Act.

12. The Apex Court in case of ***Gurmukh Singh etc. Vs. The State of Punjab, reported in A.I.R. 1972 SC 824,*** wherein the Apex Court has decided to modify the sentence. The Court was dealing with a case of selling food articles without licence under Prevention of Food Adulteration Act. The allegation against the accused was that he was found selling articles of food without licence. Alongwith other aspects the Apex Court considered the point of minimum punishment prescribed in paragraph No.9 of the judgment and it would be useful to reproduce the relevant part of paragraph No.9 of the judgment.

"9. On the question of the sentence, it is not denied

that the offence with which each of the appellants was charged was committed after the amendment of sub-s. (1) of S.16 of the Act under which the sentence has to be a minimum of six months' rigorous imprisonment and a fine of Rs.1000/-, unless it is covered by the proviso to that sub-section in which case a lesser sentence can be given for adequate and special reasons to be mentioned in the judgment. .....

It is not the case of the prosecution that the appellants sold or stored any adulterated or misbranded or prohibited articles of food. Even in such cases if the offence is with respect to an article of food which is adulterated under sub-cl. (1) of cl. (i) of sec. 2 or misbranded under sub-cl. (ix) of sec. 2 a lesser sentence under the proviso can be awarded. As pointed out in Jagdish Prasad v. State of West Bengal, Cri. App. No. 50 of 1969 D/- 13-12-1971 (SC) the offences under the Act being anti-social crimes affecting the health and well being of our people, the Legislature having regard to the trend of courts to impose in most cases only fines or where a sentence of imprisonment was passed a light sentence was awarded even in cases where a severe sentence was called for, a more drastic step was taken by it in prescribing a minimum sentence and a minimum fine to be imposed even for a first offence. The reason for the Legislature to make the exception is not that the offences specified are not considered to be serious but the gravity of the offence having regard to its nature can be less if there are any special or adequate reasons. In our view, though offences for adulteration of food must

be severaly dealt with, no doubt depending on the facts of each case which cannot be considered as precedents in other cases, in this case having regard to the fact that the offence is only one for non-renewal of a licence within a reasonable time, and the appellants as pointed out by the trying Magistrate were only petty traders a mitigation in the sentence is justified. No doubt, as the High Court point out, the reason given by the Trial Court that the accused pleaded guilty and were repentant may not be adequate. But in the special circumstances pointed out by us a lesser sentence is called for. In view of the fact that all the appellants have already served one week's sentence, we think interests of justice would be served if the sentence of six months imprisonment and fine of Rs.1000/- is reduced to a period of imprisonment already undergone by each of them, and to pay a fine of Rs.250/- and in default of which they are directed to undergo a further period of imprisonment for one month. In each of these appeals this sentence is substituted for the sentence awarded by the High Court and the appeals are accordingly allowed to this extent."

12.1 The observation of the above cited decision made by the Apex Court clearly goes to indicate that while dealing with the sentence imposed upon the accused, the Court should consider the category of case. The Court is aware that protraction of trial or delay in hearing of criminal appeal normally would not come in way of imposition of sentence and that by

condition, would not be sufficient to reduce the quantum of punishment imposed. But considering the circumstances that may be pointed out to the Court, the lesser punishment can be imposed by the Court. Ultimately, the imposition of punishment, period of punishment and substantive sentence should be able to carry the proper message to the society. But in each case the Court should not be enthusiastic to see that each order of punishment should deter the members of the society.

13. The Apex Court in case of ***Umrao Singh vs. State of Haryana, reported in AIR 1981 SC 1723***, has found that this is a fit case to award sentence lower than the minimum prescribed. In paragraph No.2, the Apex Court has observed thus:

> ***"2. Having regard to these facts, the expression of and the view of the High Court was justified. We accordingly reduce the sentence of the appellant to the period already undergone. The sentence, of fine is maintained and we are informed that he has already paid the fine. Since he is already on bail, he should be released forthwith."***

13.1 It is true that the plain reading of the

judgment, does not give detail that for how much period the appellant-accused had remained in jail but when the Court is of the view that the substantive sentence requires to be reduced, then only the Court has to look into the period already undergone.

14. So, the Court can decide to exercise powers vested with the Court under the provisions of Section 360 of the Code of Criminal Procedure because otherwise also the substantive sentence could have been reduced to any minimum period by assigning detail convincing reasons. When the Court otherwise is competent to reduce punishment than the minimum prescribed, then whether this is a case where the Court should act in reformative manner and exercise powers vested with the Court under the provisions of Section 360 of the Code of Criminal Procedure, is the question.

15. One similar question had cropped up before this Court and while answering to this question and dealing with the grievance raised by the State this Hon'ble Court (Coram: Hon'ble Mr.Justice N.J.Pandya) in case of **(The) State of Gujarat Vs. Ganpatbhai**

Premjibhai Joshi, reported in 1998 (2) G.L.H. 787, has observed thus:

> ***"4. In the decision reported in AIR 1975 SC 845, almost similar situation was dealt with by Their Lordship and it was a case under the Prevention of Food Adulteration Act and the benefit was decided to be given.***
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> ***5. Here also, it may be seen that 1958 Enactment whereby the formal expression of the legislative will to grant benefit of probation was clarified and expressed and in no uncertain terms, for the Enactments which were already on the Statute Book, necessary, reference has been made in Section 18 to exclude them. Essential Commodities Act, 1958 is not one of the Statues referred Commodities Act was very much in force at the time when said Probation of Offenders Act, 1958 came to be enacted, the Parliament, in its wisdom, has chosen not to exclude it.***
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> ***6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of Indian Penal Code as well as under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation of Offenders Act. This being not the position in relation to the offences***

under Essential Commodities Act, obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

16. With above observations this Court has confirmed the order of learned Special Judge and as regards the conviction part is concerned, had granted benefit of Section 360 of Criminal Procedure Code to an accused who found guilty of the offence punishable under the Essential Commodities Act. In subsequent decision of this Court, the benefit of Section 360 of the Code of Criminal Procedure has been recorded to victims by stating details of the fact about the accused who held guilty. One is in **Criminal Appeal No.60 of 1995 in case of Munafbhai Mohmad Arif Vohra Vs. State Of Gujarat decided on 15th February, 2007** and another in **Criminal Appeal No.712 of 1989 in case of Kayummbhai Yusufbhai Shaikh Vs. State of Gujarat decided on 15th November, 2006.**

17. Therefore, it is rightly submitted by Mr.Joshi, that this is a case where the Court should exercise the powers vested under the provisions of Section 360 of the Code of Criminal Procedure.

18. While developing this argument Mr.Joshi, learned Counsel has drawn attention of this Court to paragraph No.3 of affidavit submitted by him and informed to this Court that the appellant is a riot victim, that had disturbed the tranquility of some part of the State of Gujarat in the year 2000-2002. The appellant No.1 had lost huge property and he and his family members were suffered great mental shock and agony and the financial loss to the tune of Rs.15 Lakhs in the year 2000 and Rs.11 Lakhs in the year 2002. The accused had approached the Government for compensation. The accused was residing with his father and brother of the accused was also residing in nearby area. The appellant has also attached the complaint lodged by him before Modasa Town Police Station, Dist: Sabarkantha. The Government Notification dated 26th April, 2002 indicates that brother of the accused-Habib Sulemanbhai and father of the accused-Sulemanbhai Ibrahim being the owner and occupant who had given the financial help of Rs.50,000/- and Rs.16,000/- respectively. The certificate issued by Chief Officer, Modasa Municipality dated 20th April, 2002 clearly shows that the business premises were set on fire and therefore the Municipality had not charged for use of

firefighter to the victim. Of course, this is a business premises other than the premises that was used by the family of the accused. The appellant-accused had also approached the National Human Right Commission by written complaint dated 21st August, 2000. So, there is ample evidence of reliable nature brought to the notice of the Court from which it is possible to infer that the appellant-accused is a riot victim who belongs to family of riot victim.

19. On imposition of imprisonment, the appellant-accused shall have to go to jail. The alleged offence is of 1986. When the appellant-accused has been enjoying bail and after about 20 years, he is asked to go to jail, it would be a matter of mental agony not only to the accused but also to the family members who however may not be responsible for such small irregularities that might have been committed by the servants of the appellant being a whole seller. So, confirming the award of conviction and fine imposed by the trial Court, the accused can be and should be given the benefit of Section 360 of the Code of Criminal Procedure.

20. Here, the Court would like to refer the

decision of the Apex Court in case of **Harivallabha and Another Vs. State of Madhya Pradesh, reported in (2005) 10 S.C.C. 330,** whereby, placing reliance on this decision this Court has granted benefit of Section 4 of Probation of Offenders Act, read with Section 361 of the Code of Criminal Procedure in case of Munafbhai Mohmad Arif Vohra (Supra). It is not necessary to quote the relevant part of the cited decision. But, the Apex Court has held that in facts and circumstances of the case, the appellant should have been dealt with Section 360 of the Code of Criminal Procedure. The Apex Court confirmed the conviction and sentence of fine but set aside the sentence of imprisonment. Of course in this decision the trial Court was directed to exercise the powers vested under Section 360 of the Code of Criminal Procedure. But, this Court dealing with the appeal against the order of conviction can exercise powers vested with the trial Court in view of Section 360 read with Section 361 of the Code of Criminal Procedure.

21. Ms.Pandit, learned A.P.P. has submitted that in a give case if the Court exercise powers under the

provisions of Section 360 of the Code of Criminal Procedure then the approach of the State would be constructive.

22. In the result, the present Criminal Appeal No.556 of 1995 is partly allowed. While confirming the judgment and order of conviction and sentence of fine passed by the learned Additional Sessions Judge, Sabarkantha at Himmatnagar in Summary (Criminal Case) No.11 of 1987 on 27th March, 1995, the order of substantive sentence is hereby altered.

22.1 The appellant-accused is directed to execute the bond of Rs.5,000/- (Rupees Five Thousand Only) of good conduct with one surety of the like amount for the period of two years under the scheme of Section 360 read with Section 361 of Criminal Procedure Code, 1973. The appellant-accused shall execute the bond of good conduct before the concerned trial Court within a period of 15 days from the date of receipt of the copy of this writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court. The order of substantive sentence shall remain

under suspension till the period of bond of good conduct i.e. for two years and shall become inoperative on completion of the period.

22.2 The appellant-accused is also directed that in case of violation of any of the conditions of the bond of good conduct, the trial Court shall at liberty to issue warrant for serving the sentence imposed by the concerned trial Court.

22.3 The Bail Bond executed by the appellant-accused shall stand discharged on the date on which the appellant-accused executes the bond of good conduct before the trial Court. Order and Direction accordingly.

23. Before parting with the order, the Court would like to observe that the Court has considered not only the fact that accused is a riot victim and the time gap between the order of conviction and hearing of the appeal, but has also considered the age of the accused and the fact that there was scope to even reduce the substantive sentence imposed by the trial Court

in view of the two Apex Court decisions referred to herein above.

24. Ms.Pandit, learned A.P.P. has fairly pointed out that it is erroneously mentioned by the learned Judge while recording plea that the accused was dealing with a fair price shop. He was a licence holder and has not been convicted as fair price shop dealer. So the accused was not a part of public distribution system otherwise, the Court would not have exercised the discretion in favour of the accused. The Court is inclined to observe that, when it comes to awarding of substantive sentence where the offence is not of that grave nature and the Court finds that accused is a victim of either social or ecological imbalance or disturbance or any disaster beyond control of the accused keeping in mind the basic principle of victimology that has occurred after commission of offence, the Court must assign reasons as to why benefit either under Section 360 read with Section 361 or under Section 4 or 6 as the case may be, has not been

given to the appellant-accused. The protraction of trial or hearing of the appeal is not relevant while evaluating the validity and legality of the judgment or considering the quantum of period of punishment, but the conduct of the accused in the period in between can be considered while dealing with the plea of Probation of Offenders Act. If he turns so positive and helpful to the society in an illustrative way, then, application of reformatory school of thoughts would be appropriate by granting benefit under Section 360 read with Section 361 of the Code of Criminal Procedure or under Section 4 and 6 of the Probation of Offenders Act.

(C.K.BUCH, J.)

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